

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: September 28, 2001

BALCA Case No. 2000-INA-107
ETA Case No. P1999-NY-02420087

In the Matter of:

HALINA SEMLA-PULASKI, MD.,
Employer,

on behalf of

MARIA GADEK,
Alien.

Appearance: Andrew J. Olshevski, Esquire
Brooklyn, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam: This case arises from an application for labor certification¹ filed by Halina Semla-Pulaski for the position of Cook, Polish Style (AF 10).² The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. §656.27(c).

STATEMENT OF THE CASE

The application was filed on September 12, 1997, seeking labor certification for Maria Gadek,

¹ Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² "AF" is an abbreviation for "Appeal File."

Alien. The duties of the job were described as follows:

Prepare & cook family style, Polish cuisine, foods & meals. Serve meals. Assist the owner of the residence in menu preparation. Purchase foodstuffs. Check foodstuffs for quality & quantity. Cook foodstuffs in quantities according to the number of guests and as suitable for occasion. Follow recipes and dietary requirements. Prepare preserves, galantines. Bake cakes & fancy pastries. Clean kitchen & cooking utensils.

Employer required that applicants have eight years of education and two years of experience in the job offered. In addition, Employer required that applicants not smoke on the premises. The hours of employment are 8 am to 4 pm.

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on June 28, 1999. (AF 19-24) The CO stated that the requirement that applicants have two years of experience preparing Polish style meals is not a normal job requirement found in the Dictionary of Occupational Titles and is therefore an unduly restrictive job requirement. The CO instructed Employer to delete the requirement or establish that it arises from a business necessity. The CO directed that rebuttal evidence include: (a) evidence to support that an applicant with two years of cooking experience could not readily adapt to a Polish style of cooking; (b) evidence to show that an applicant with no prior experience in Polish cooking is incapable of preparing Polish food; and (c) document why Employer, or anyone in his/her family, is unable to provide training or instruction in the Polish cooking tradition. The CO also instructed Employer to prove that the job existed before the Alien was hired or the application filed and was filed with the same job duties and requirements; or if the job did not previously exist, document that a major change in the household operation caused the job to be created. The CO also gave Employer the option of deleting the requirement. 20 CFR 656.21(b)(2) In addition, the CO stated that Employer must submit evidence that the offered job is *bona fide* and open to any U.S. worker. 20 CFR 656.20(c)(8) The CO instructed Employer to answer a series of questions pertaining to this issue.

Employer responded with rebuttal on August 4, 1999. (AF 28-35) As to whether the offered job is *bona fide*, Employer presented a factual and legal argument based on Modular Container Systems, Inc., 1989-INA-228 (1991)(*en banc*), concluding that the absence of the Alien would adversely impact the household's well-being in terms of the help it needs. (AF 33) In response to the COs questions, Employer stated that the cook would prepare three meals per day, five days per week, with occasional entertaining on Fridays and Saturdays; that four hours and 15 minutes would be spent daily preparing meals; that food purchasing would take one and one-half to two hours per day; and that dish washing would occupy four hours per week. Employer stated further that daily meals are to be prepared for her, her spouse, their two children and numerous guests; that she works between the hours of 9 AM and 7 PM; that their two children are 13 and 22; that they attend school from 8 AM to 5 PM; that no other domestic workers are employed in the household; that the Alien learned of the job through a friend; that "[t]he nutritional requirements are those of the Polish style cuisine and the prospective employer maintains the claim to her right to enjoy the food of his (sic) liking. Both Ms. Semla-Pulaski and her spouse are of Polish descent." (AF 31) Employer

also stated that no one in the family is available or qualified to teach an inexperienced cook how to prepare Polish style meals. She stated “[i]t is highly unreasonable to assume that there will be anyone willing to provide training while at the same time paying the salary exceeding \$36,000.00.” (AF 29) Employer’s 1998 Federal income tax return was included with rebuttal.

The CO issued a Final Determination denying certification on September 24, 1999. (AF 36037) The CO incorrectly stated that the NOF did not raise the issue of experience preparing Polish style meals as a restrictive requirement of the offered job (20 CFR § 656.21(b)(2)) and proceeded to base the denial on Employer’s failure to prove that a *bona fide* domestic cook position exists within Employer’s household. 20 CFR § 656.20(c)(8). The CO stated that the daily schedule for the residents of the household was incomplete; that Employer failed to provide her spouse’s schedule and the children’s complete school schedules; that the cook would not be preparing breakfasts or lunches for the family because they would not be home; that the cook would only be preparing dinners for the family. The CO also stated that the extent of the cook’s involvement in preparing meals for guests could not be determined because Employer did not provide her entertainment schedule. The CO also stated that it is highly improbable that Employer would spend approximately 57% of her adjusted gross annual income to pay the cook’s salary.

Employer requested administrative-judicial review of the denial on October 29, 1999. (AF 38-46)

DISCUSSION

Twenty CFR 656.20(c)(8) requires that the employer offer a *bona fide* job opportunity. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). Whether a job opportunity is *bona fide* is gauged by a “totality of the circumstances” test. *Id.* When an employer presents a labor certification application for a domestic cook, attention immediately focuses on whether the application presents a *bona fide* job opportunity because common experience suggests that few households retain an employee whose only duties are to cook, or could even afford the luxury of retaining such an employee. *Id.* Moreover, the burden of proving that the offered job is a *bona fide* job opportunity and specifically full-time employment is on the employer. *Id.*, citing *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*).

Employer petitioned to hire the Alien as a full-time cook at an annual salary of \$36,628.00 to prepare meals for her family and guests. However, the record reflects work and school schedules that will prevent the family from being home to eat breakfasts and lunches. Moreover, Employer made no contention in rebuttal that the cook would be preparing carry-out meals for the family. In addition, Employer did not provide an entertainment schedule that may have documented a need for a cook to prepare meals for guests on occasion. On the basis of the evidence in this record, it appears that the only meals that the cook would prepare for Employer’s family are five dinners per week. In addition, there is the issue of whether Employer can afford to pay the cook’s annual salary. The regulations require that Employer demonstrate that she has enough monies available to pay the Alien’s salary. 20 C.F.R. § 656.20(c)(1); *White Harvest Mission*, 1990-INA-195 (April 9, 1991). The adjusted gross income shown on the partial 1040 form contained in the record does not establish that she has sufficient monies to

pay the cook's annual salary and still provide support for herself and her family.

We conclude on the basis of this record that Employer has not carried her burden of proof to show that the offered job is *bona fide* employment as a domestic cook. Accordingly, certification was properly denied.

ORDER

The Certifying Officer's denial of Labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.